112 F.3d 291
65 USLW 2704, Prod.Liab.Rep. (CCH) P 14,919

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

Nancy GRACIA, Plaintiff-Appellant,
v.
VOLVO EUROPA TRUCK, N.V., a foreign
corporation, Defendant-Appellee.
No. 96-2774.
United States Court of Appeals, Seventh Circuit.
Argued Dec. 6, 1996—Decided April 24, 1997.
Rehearing and Suggestion for Rehearing
En Banc Denied June 10, 1997.

Passenger brought state common-law strict liability action against manufacturer of forward control truck that weighed over 10,000 pounds, claiming that its windshield retention system was unreasonably dangerous and inadequate to prevent windshield from ejecting during foreseeable impacts. The United States District Court for the Northern District of Illinois, Paul E. Plunkett, J., 1996 WL 351200, granted manufacturer's motion for summary judgment. Passenger appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) safety standard promulgated under National Traffic and Motor Vehicle Safety Act, which standard specifically excluded forward control vehicles and vehicles with gross vehicle weight rating of more than 10,000 pounds from windshield retention requirements for motor vehicles during crashes, expressly preempted state common-law strict liability claim, and (2) as matter of first impression, existence of savings provision in Act does not reflect congressional intent that common-law claims are never preempted.

Affirmed.

[1] STATES k18.3
360k18.3
Court interpreting federal statute pertaining to subject traditionally governed by state law will be reluctant to find preemption.

[2] STATES k18.11
360k18.11
Preemption will be found only in those situations where it is the clear and manifest purpose of Congress.

[3] STATES k18.3
360k18.3
Federal preemption of state law can occur in three circumstances: (1) "express preemption" where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied entire field, i.e., "field preemption," and (3) implied preemption where there is actual conflict between federal and state law, i.e., "conflict preemption." See publication Words and Phrases for other judicial constructions and definitions.

[4] PRODUCTS LIABILITY k35.1
313Ak35.1
Safety standard promulgated under National Traffic and Motor Vehicle Safety Act, specifically excluding forward control vehicles and vehicles with gross vehicle weight rating of more than 10,000 pounds from windshield retention requirements for motor vehicles during crashes, expressly preempted state common-law strict liability claim that retention system in forward control truck that weighed more that 10,000 pounds was unreasonably dangerous and inadequate to prevent windshield from ejecting during foreseeable impacts; existence of exclusionary language in safety standard had to be read as

representing conscious decision by National Highway Transportation Safety Administration, and regulatory history revealed that inclusion of such vehicles was considered but rejected. 49 U.S.C.A. § 30103(b)(1); 49 C.F.R. § 571.212.S1.

[4] STATES k18.65
360k18.65
Safety standard promulgated under National Traffic and Motor Vehicle Safety Act, specifically excluding forward control vehicles and vehicles with gross vehicle weight rating of more than 10,000 pounds from windshield retention requirements for motor vehicles during crashes, expressly preempted state common-law strict liability claim that retention system in forward control truck that weighed more that 10,000 pounds was unreasonably dangerous and inadequate to prevent windshield from ejecting during foreseeable impacts; existence of exclusionary language in safety standard had to be read as representing conscious decision by National Highway Transportation Safety Administration, and regulatory history revealed that inclusion of such vehicles was considered but rejected. 49 U.S.C.A. § 30103(b)(1); 49 C.F.R. § 571.212.S1.

[5] CONSUMER PROTECTION k11
92Hk11
Term "standard" as used in National Traffic and Motor Vehicle Safety Act's preemption provision, which bars state standard different from federal motor vehicle safety standard, refers to state common law as well as statutes and regulations. 49 U.S.C.A. § 30103(b)(1).
See publication Words and Phrases for other judicial constructions and definitions.

[5] PRODUCTS LIABILITY k35.1
313Ak35.1
Term "standard" as used in National Traffic and Motor Vehicle Safety Act's preemption provision, which bars state standard different from federal motor vehicle safety standard, refers to state common law as well as statutes and regulations. 49 U.S.C.A. § 30103(b)(1).
See publication Words and Phrases for other judicial constructions and definitions.

[5] STATES k18.65
360k18.65
Term "standard" as used in National Traffic and Motor Vehicle Safety Act's preemption provision, which bars state standard different from federal motor vehicle safety standard, refers to state common law as well as statutes and regulations. 49 U.S.C.A. § 30103(b)(1).
See publication Words and Phrases for other judicial constructions and definitions.

[6] PRODUCTS LIABILITY k35.1
313Ak35.1
Existence of savings provision as well as preemption provision in National Traffic and Motor Vehicle Safety Act does not reflect congressional intent that state common-law claims are never preempted; intention of Congress with regard to savings provision was to prevent manufacturer from having complete defense to common-law action not addressed by federal standard by merely stating that it was in full compliance with all federal safety standards, and common-law claims are preserved only when they do not deviate from federal standards. 49 U.S.C.A. § 30103(b)(1), (e).

[6] STATES k18.65
360k18.65
Existence of savings provision as well as preemption provision in National Traffic and Motor Vehicle Safety Act does not reflect congressional intent that state common-law claims are never preempted; intention of Congress with regard to savings provision was to prevent manufacturer from having complete defense to common-law action not addressed by federal standard by merely stating that it was in full compliance with all federal safety standards, and common-law claims are preserved only when they do not deviate from federal standards. 49 U.S.C.A. § 30103(b)(1), (e).

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Jeffrey R. White, Association of Trial Lawyers of America, Washington, DC, for amicus curiae Association of Trial Lawyers of America.

Christine L. Olson, D. Kendall Griffith, Hinshaw & Culbertson, Chicago, IL, for amicus curiae Defense Research Institute, Inc.

Before BAUER, COFFEY, and FLAUM, Circuit Judges.

*293 COFFEY, Circuit Judge.

Appellant Nancy Gracia brought a diversity action against Volvo Europa Truck, N.V. ("Volvo") under Illinois common law for personal injuries sustained during a collision while riding in a truck manufactured by Volvo. Pursuant to Federal Rule of Civil Procedure 72(b), the district court judge referred this case to a magistrate judge, without the consent of the parties, for all matters up to and including the filing of the final pretrial order. (R. 151; R. 346 at 3.) After completion of discovery, Volvo filed a motion for summary judgment relying on preemption by a federal safety standard. The magistrate judge recommended denying Volvo's motion. The district court rejected the magistrate judge's report and recommendation, and granted Volvo's motion for summary judgment. Gracia appeals. We affirm the decision of the trial court.

I. BACKGROUND

A. Facts

Gracia worked for Brook Furniture Rental, which leased a 1986 Volvo FE6/13 truck from Ryder Truck Rental. On August 12, 1987, Gracia was riding with two of her co-workers in the cab of the Volvo truck. The truck was a forward control vehicle, with its windshield installed flush with its front end, as contrasted with the recessed windshield on a passenger car. Gracia was seated on the engine cover (often referred to as the "doghouse" or "engine bonnet") located in the front of the vehicle and between the two seats occupied by the driver and another passenger, both co-workers of Gracia. The

seats of the driver and passenger are equipped with seat belts, however, because there is no passenger seat on the engine cover it was not equipped with a seat belt or any other restraining device. Neither of Gracia's co-workers had their seat belts buckled. The truck was traveling on the Kennedy Expressway when it rear-ended a salvage truck traveling in the same direction. Upon impact the Volvo's windshield was dislodged as designed and fell to the pavement. Gracia was catapulted through the windshield opening onto the pavement in front of the truck and sustained a spinal injury. Neither of the other two occupants were ejected from their seats, nor did they sustain serious injuries.

As a result of her injuries, Gracia was admitted to a hospital and received medical treatment. Gracia was unable to work from the date of the injury, August 12, 1987, until March 1, 1988. Thereafter, Gracia returned to part-time employment and a short time later resumed full-time employment assigned to different duties.

Gracia filed suit against Volvo, the truck's manufacturer, alleging that the vehicle was defective under Illinois common law for the windshield retention system was unreasonably dangerous and inadequate to prevent the windshield from ejecting during foreseeable impacts.[1]

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[1] Gracia contends that she would not have sustained any serious injuries if the windshield had been bonded to the frame of the truck's cab by an adhesive material or metal flange and a rubber seal. The subject truck's windshield was held into the frame with rubber, which Gracia believes constitutes a design deficiency and makes the vehicle unreasonably dangerous. However, if the windshield had remained in place Gracia and her two co-workers could have suffered a fractured skull, lacerated face, or serious eye damage by impacting with the window.

B. District Court Proceedings

On November 19, 1987, Gracia filed a product liability suit in the Circuit Court of Cook County. Thereafter, Volvo after establishing diversity jurisdiction had the case removed to the United States District Court for the Northern District of Illinois. Volvo moved for summary judgment arguing that Gracia's strict liability claim is preempted by the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103(b)(1), which provides that when a federal motor vehicle safety standard is in effect, any non-identical state safety standard is not applicable and is therefore, not binding on manufacturers. The magistrate judge found that the relevant federal safety standard regarding windshield retention requirements did not apply to the type of truck at issue in this case and recommended denial of the motion for summary judgment. The magistrate judge reasoned that the agency had excluded trucks like the *294 one at issue from the standard's requirements, not because of an affirmative decision that there should be no regulation, but because of a lack of data demonstrating the need for that type of vehicle to be covered by the standard. (Report and Recommendation of March 6, 1996, at 7.) The district court rejected the magistrate judge's report and recommendation and granted the motion for summary judgment finding federal preemption. If it was the agency's intent to specifically exclude vehicles such as the one at issue from having to meet windshield retention requirements and the National Traffic and Motor Vehicle Safety Act's preemption clause precludes common law claims, then the granting of this motion was proper.

II. DISCUSSION

A. Summary Judgment

"Summary judgment is appropriate when the record, viewed in a light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Vector-Springfield Properties, Ltd. v. Central Illinois Light Co., Inc., 108 F.3d 806, 809 (7th Cir.1997) (citing Fed.R.Civ.P. 56(c)). We review the trial court's order granting summary judgment de novo. Id. at 809. Upon the filing of a motion for summary judgment, the burden shifts to the non-moving party to demonstrate with specific evidence that a triable issue of fact remains on issues on which the non-movant bears the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The mere existence of some alleged factual dispute is insufficient to defeat an otherwise properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In this case, the parties agree on the facts relating to the accident and injury, but dispute whether Gracia's tort claim is preempted by federal law.

B. Federal Preemption

[1][2][3] The Supremacy Clause of the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, Congress has the authority to pre-

empt state law. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986); Time Warner Cable v. Doyle, 66 F.3d 867, 874 (7th Cir.1995), cert. denied, ___ U.S. ___, 116 S.Ct. 974, 133 L.Ed.2d 894 (1996). "In determining whether the Congress has preempted state law, our task is to discern congressional intent." Time Warner Cable, 66 F.3d at 874 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381-82, 112 S.Ct. 2031, 2036, 119 L.Ed.2d 157 (1992)). A court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-64, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993). Therefore, preemption will be found only in those situations where it is "the clear and manifest purpose of Congress." Id. at 664, 113 S.Ct. at 1737 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption). English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990); American Agriculture Movement, Inc. v. Board of Trade of Chicago, 977 F.2d 1147, 1154 (7th Cir.1992). In Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), the Supreme Court suggested that a Congressional decision to include an explicit preemption provision in legislation forecloses a finding of implied preemption from that legislation, so

long as the provision "provides a reliable indicium of congressional intent with respect to state authority." Some three years later, in Freightliner Corp. v. Myrick, 514 U.S. *295 280, 288-90, 115 S.Ct. 1483, 1488, 131 L.Ed.2d 385 (1995), the Court disagreed with that suggestion and proceeded to address the merits of the defendants' implied preemption argument. The Court explained that, "[a]t best, Cipollone supports an inference that an express pre-emption clause forecloses implied preemption; it does not establish a rule." Id.

C. National Traffic and Motor Vehicle Safety Act

Congress enacted the National Traffic and Motor Vehicle Safety Act ("Safety Act") with the express purpose in mind of trying "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101.[2] In order to accomplish this objective, the Safety Act delegates to the Secretary of Transportation the authority to establish "federal motor vehicle safety standards" ("FMVSS" or "safety standards") that "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). The Secretary has delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). 49 C.F.R. § 1.50; see 49 C.F.R. § 501.2.[3]

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[2] The Safety Act was previously codified at 15 U.S.C. § 1381 et seq., but in 1994 was recodified without substantive change at 49 U.S.C. § 30101 et seq.

[3] The Safety Act is a statute, while the federal motor vehicle safety standards are regulations established by the NHTSA; however, they are consistently referred to as "safety standards" and, therefore, this term is used to refer to them throughout this opinion.

The safety standard relevant to this appeal is FMVSS 212, which "establishes windshield retention requirements for motor vehicles during crashes." 49 C.F.R. § 571.212.S1.[4] This standard does not apply to vehicles

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[4] The relevant portion of the safety standard states:

> S2. Purpose. The purpose of this standard is to reduce crash injuries and fatalities by providing for retention of the vehicle windshield during a crash, thereby utilizing fully the penetration-resistance and injury-avoidance properties of the windshield glazing material and preventing the ejection of occupants from the vehicle.
>
> S3. Application. This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 4536 kilograms [10,000 pounds] or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.
>
> S4. Definition. Passive restraint system means a system meeting the occupant crash protection requirements of S5. of Standard No. 208 by means that require no action by vehicle occupants.
>
> S5. Requirements. When the vehicle traveling longitudinally forward at any speed up to and including 48 kilometers [30 miles] per hour impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, under the conditions of S6, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified in S5.1 and S5.2.
>
> S5.1 Vehicles equipped with passive restraints. Vehicles equipped with passive restraint systems shall retain not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.
>
> S5.2 Vehicles not equipped with passive restraints. Vehicles not equipped with passive restraint systems shall retain not less than 75 percent of the windshield periphery.

49 C.F.R. § 571.212 (emphasis in original).

that have a gross vehicle weight rating of more than 10,000 pounds and, furthermore, explicitly excludes forward control vehicles. 49 C.F.R. § 571.212.S3. It is uncontroverted that this federal safety standard does not apply to the truck at issue because it not only exceeds 10,000 pounds, but it is also a forward control vehicle.

The Federal Safety Act contains an express preemption clause that states:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1) (emphasis added). However, the act also contains a savings clause that reads: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). *296 A motor vehicle safety standard is broadly defined as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9).

D. Preemption Analysis

[4] Volvo asserted that Gracia's state common law claim is preempted by FMVSS 212 both expressly and by implication. The district court agreed and granted Volvo's motion for summary judgment. Gracia opposed Volvo's summary judgment motion on several grounds. First, in reliance on Myrick, Gracia asserts that since the

windshield retention requirements of FMVSS 212 do not apply to the Volvo truck, there is no federal safety standard on windshield retention for this type of vehicle and therefore, no express preemption. Gracia further contends that, because there is no relevant standard, there also cannot be any implied conflict with state common law standards. However, Gracia's reliance on Myrick is misplaced, as that case fails to support her contention.

The facts and reasoning in Myrick do not preclude a finding of preemption in this case, and in fact, support the determination that Gracia's state common law claim is preempted. The Myrick Court in its decision likewise analyzed the federal Safety Act, but specifically dealt with FMVSS 121, which concerns stopping distances and vehicle stability requirements. In Myrick, two cases were consolidated in which trucks jackknifed and collided with oncoming plaintiffs, allegedly due to the absence of anti-lock braking systems ("ABS"). State common law design defects claims were brought against manufacturers of the tractor-trailers. The Court found that the common law actions were neither expressly nor implicitly preempted because there was no federal standard dealing with the vehicles in question. Prior to Myrick, the Ninth Circuit had suspended standard 121 until the NHTSA could compile sufficient evidence showing that the use of ABS on trucks and trailers would not increase the possibility of danger. Paccar, Inc. v. NHTSA, 573 F.2d 632 (9th Cir.1978). In response, the NHTSA amended standard 121 so that it no longer applied to trucks and trailers. Myrick, 514 U.S. at 283-86, 115 S.Ct. at 1486. In Myrick, the Court concluded that:

> Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulation.

Id. at 286-87, 115 S.Ct. at 1487 (footnote omitted). The Court found that standard 121 simply said nothing, one way or the other, about the use of ABS devices for tractor-trailers and concluded that there is no federal standard to conflict with. Id. at 288-90, 115 S.Ct. at 1488.

In contrast, here there is a specific federal standard addressing windshield retention for the truck at issue, in which the NHTSA determined that this type of vehicle should be exempt from the affixing requirement. The Supreme Court has held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis added); see also Myrick, 514 U.S. at 286-88, 115 S.Ct. at 1487. In federal safety standard 212, which we analyze in this case, the NHTSA specifically listed which type of vehicles were excluded from complying with the windshield retention requirements, rather than merely re-

citing the vehicles that were covered by the standard.[5] "[W]e have a duty to 'give effect, if possible, to every clause and word of a statute.'" In re Lifschultz Fast Freight Corp., 63 F.3d 621, 628 (7th Cir.1995) (quoting Moskal v. United States, 498 U.S. 103, 109, 111 S.Ct. 461, 466, 112 L.Ed.2d 449 *297 (1990)). Therefore, the existence of the exclusionary language in the federal safety standard mandates that we interpret it as representing a conscious decision by the NHTSA. An examination of the legislative history further bolsters that it was the intent of the NHTSA to exclude trucks such as the one at issue in this case from having to meet any windshield retention requirements.

In 1969 the NHTSA's predecessor, the Federal Highway Administration, proposed to extend standard 212 to cover vehicles such as the truck at issue. 34 Fed.Reg. 14438 (1969) (proposed Sept. 10, 1969); (R. 216, Ex. 5.) The response submitted in opposition to this amendment by the Automobile Manufacturers Association ("AMA") explained that the configuration of forward control vehicles renders any level of windshield retention basically meaningless because the impact either directly involves the windshield or results in severe deformation of the windshield mounting structure. (R. 216, Ex. 6, AMA's Comments on Proposed Amendment, at S70-3.4 and S70-3.5.) The AMA further explained that the windshield has been identified as an important means of escape from a truck, particularly when it comes to rest on its side after an accident. (Id.) After receiving responses such as these,

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[5] The standard specifically excludes forward control vehicles, walk-in van-type vehicles, and open-body-type vehicles with fold-down or removable windshields. 49 C.F.R. § 571.212.S3.

the NHTSA decided that forward control vehicles, such as the truck at issue, would not be required to comply with the standard until September 1, 1978. 37 Fed.Reg. 16980 (1972) (recognizing that forward control vehicles would have difficulty in retaining windshields because of reasons given by AMA). The NHTSA finally determined in 1977 that given the design of forward control vehicles it was both technically impracticable to design windshields which could comply with the standards and impracticable to apply the standard's barrier crash tests to these vehicles. 42 Fed.Reg. 34289 (1977); 41 Fed.Reg. 36193 (1976).

The district court correctly determined that Gracia's common law claim was preempted and stated that "there has been 'an affirmative decision by agency officials' that there should be no standard because the nature of the cab design on forward control vehicles makes compliance with the minimum standard set by FMVSS impracticable." (R. 346, Memorandum Opinion and Order of June 20, 1996, at 15-16 (quoting Myrick, 514 U.S. at 286-87, 115 S.Ct. at 1487).) Allowing a state common law standard on windshield retention would, accordingly, be a standard that is not identical to the federal one. Therefore, we conclude that the NHTSA's explicit exclusion of forward control vehicles from having to meet any windshield retention requirements in federal safety standard 212, along with the inapplicability of the standard to vehicles over 10,000 pounds, expressly preempts Gracia's state common law action.

E. Safety Standard and Common Law

[5] Gracia also argues that her common law claims are not preempted by the Safety Act's requirement that

states only have identical motor vehicle safety standards. Gracia believes that the preemption of non-identical state safety standard applies only to state statutes and regulations, while common law actions remain available. In Myrick, the Court did not reach the issue of whether the preemption clause's use of the term "standard" preempts only state statutes and regulations, but not common law actions.[6] Myrick, 514 U.S. at 287 n. 3, 115 S.Ct. at 1487 n. 3. However, other cases have interpreted similar language in other preemption clauses and found that the term "standard" not only refers to state statutes and regulations, but can also refer to common law. See, e.g., CSX Transportation, 507 U.S. at 664, 113 S.Ct. at 1737-38; Cipollone, 505 U.S. at 521-22, 112 S.Ct. at 2620. Therefore, Gracia's argument is unpersuasive and does not alter our conclusion that her claim is preempted.

F. Congressional Intention and Legislative History

[6] Gracia additionally argues that reading the preemption and savings clause in conjunction leads to the conclusion that Congress did not intend for common law actions to ever be preempted. In support of this *298 claim, she contends that the legislative history suggests that common law claims are not preempted and thereby precludes a finding of a "clear and manifest purpose" of Congress to preempt.

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[6] The Myrick Court also found it unnecessary to reach the issue of whether the savings clause prevents manufacturers from using a federal safety standard to immunize itself from state common law liability. Myrick, 514 U.S. at 287 n. 3, 115 S.Ct. at 1487 n. 3.

Because this is a case of first impression for this court, we believe it is helpful to review the legislative history which establishes that state common law claims can be preempted by a federal safety standard. The legislative history shows that the House Committee amended the original Safety Act bill to insert the savings clause. The House Committee Report explained the purpose of the savings clause in stating "it is intended and this subsection specifically establishes that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 89-1776, at 24 (1966).

The Safety Act, in order that it might achieve its primary purpose of reducing traffic injuries and fatalities, also had the objective of establishing uniform national safety standards and adequate enforcement of those standards, as the legislative history indicates. S.Rep. No. 89-1301, at 12 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2720. We agree that when a state requirement is not identical to the federal standard it would obviously impede the objective of uniform national standards. The NHTSA has decided that forward control vehicles and vehicles that weigh more than 10,000 pounds should be exempt from meeting windshield retention requirements.

If Gracia's common law claim was not preempted, then manufacturers would be placed in a position where they could be subject to varying standards from state to state, which could not all be complied with simultaneously. For instance, one state's common law could require stringent windshield retention, while another state's could require that windshields not be permanently affixed. If this were the case, then the manufacturer would be subject to

liability if the windshield were ejected in an accident in one state, but in another state would be liable if a windshield remained intact and a trapped victim were unable to escape from the vehicle.

The intention of Congress was not to preserve common law claims when they conflict with NHTSA standards, but to prevent a manufacturer from having a complete defense to a common law action not addressed by a NHTSA standard by merely stating that it is in full compliance with all federal safety standards.[7] Additionally, the Supreme Court has held that similar savings clauses do not preserve conflicting or non-identical state common law actions from preemption. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992); International Paper Co. v. Ouellette, 479 U.S. 481, 493-94, 107 S.Ct.

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[7] Gracia's dependence on language pertaining to the savings clause from both the House Report and statements from the floor of the Senate does not contradict this contention. The House Report stated "[i]t is intended and [the savings clause] specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R.Rep. No. 89-1776, at 24 (1966). Gracia also ineffectively seeks support from Senator Magnuson's statement that:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong.Rec. 21, 487 (1966).

805, 812-13, 93 L.Ed.2d 883 (1987). Therefore, the only way effect can be given to both sections is for common law claims to be preserved only when they do not deviate from the standards set forth by the NHTSA.[8]

III. CONCLUSION

Having concluded that Gracia's common law tort action is preempted by FMVSS 212, *299 we find moot and need not analyze the alternative arguments that Volvo raises in support of its contention that the district court's decision be affirmed on other grounds. We AFFIRM the district court's decision to grant Volvo's motion for summary judgment based on federal preemption.

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[8] Accordingly, a manufacturer who complied with all of the safety standards could still be sued under the common law for a defect that was not discussed and covered by the safety standards.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 10, 1997.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

NANCY GRACIA,

Plaintiff-Appellant,

No. 96-2774 v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 10005—Paul E. Plunkett, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant Nancy Gracia, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. § 30101 (1996)

Purpose and policy

The purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary –

(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and

(2) to carry out needed safety research and development.

49 U.S.C. § 30103(b) (1996)

(b) PREEMPTION. – (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

49 U.S.C. § 30103(e) (1996)

(e) COMMON LAW LIABILITY. – Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

49 C.F.R. § 571.121 (1996)

S3. *Application.* This standard applies to trucks, buses, and trailers equipped with air brake systems. However, it does not apply to:

> **(e)** Any trailer that has a GVWR of more than 120,000 pounds and whose body conforms to that described in the definition of heavy hauler trailer set forth in S4;

49 C.F.R. § 571.208 (1996)

S1. Scope. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. Purpose. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. Application. This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9, Pressure vessels and explosive devices, applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above

types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash. Notwithstanding any language to the contrary, any vehicle manufactured after March 19, 1997 and before September 1, 2001 that is subject to a dynamic crash test requirement conducted with unbelted dummies may meet the requirements specified in S13 instead of the applicable unbelted requirement. For vehicles manufactured before September 1, 1998, compliance with S13 shall, for purposes of Standards Nos. 203 and 209, be deemed as compliance with the unbelted frontal barrier requirements of S5.1 of this section.

S4. General requirements.

S4.1 Passenger cars.

S4.1.1 Passenger cars manufactured from January 1, 1972, to August 31, 1973. Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 First option—complete passive protection system. The vehicle shall meet the crash protection requirements of S5. by means that require no action by vehicle occupants.

S4.1.1.2 Second option—lap belt protection system with belt warning. The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a

detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 Third option—lap and shoulder belt protection system with belt warning.

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986. Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 First option—frontal/angular automatic protection system. The vehicle shall:

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either

(1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that con-

forms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 Second option—head-on automatic protection system. The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 Third option—lap and shoulder belt protection system with belt warning.

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a

Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.

S4.1.3.1 Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did

not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.3.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with

the requirements of S4.1.2.1. shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

S4.1.3.4 Calculation of complying passenger cars.

(a) For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(1) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

(b) For the purposes of complying with S4.1.3.1.2, a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1986, and

(2) Complies with S4.1.2.1.

(c) For the purposes of complying with S4.1.3.2.2, a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1987,

(2) Complies with S4.1.2.1, and

(3) Is not counted toward compliance with S4.1.3.1.2.

(d) For the purposes of complying with S4.1.3.3.2, a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1988,

(2) Complies with S4.1.2.1, and

(3) Is not counted toward compliance with S4.1.3.1.2 or S4.1.3.2.2.

S4.1.3.5. Passenger cars produced by more than one manufacturer.

S4.1.3.5.1 For the purposes of calculating average annual production of passenger cars for each manufacturer and the amount of passenger cars manufactured by each manufacturer under S4.1.3.1.2, S4.1.3.2.2 or S4.1.3.3.2, a passenger car produced by more than one manufacturer shall be attributed to a single manufacturer as follows, subject to S4.1.3.5.2:

(a) A passenger car which is imported shall be attributed to the importer.

(b) A passenger car manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, shall be attributed to the manufacturer which markets the vehicle.

S4.1.3.5.2 A passenger car produced by more than one manufacturer shall be attributed to any one of the vehicle's manufacturers specified by an express written contract, reported to the National Highway Traffic Safety

Administration under 49 CFR Part 585, between the manufacturer so specified and the manufacturer to which the vehicle would otherwise be attributed under S4.1.3.5.1.

S4.1.4 Passenger cars manufactured on or after September 1, 1989, but before September 1, 1996.

S4.1.4.1 Except as provided in S4.1.4.2, each passenger car manufactured on or after September 1, 1989 shall comply with the requirements of S4.1.2.1. Any passenger car manufactured on or after September 1, 1989 and before September 1, 1993 whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front designated seating position is equipped with a manual Type 2 seat belt so that the seating position complies with the occupant crash protection requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not know in the exercise of due care that such vehicle is not in conformity with this standard.

S4.1.4.2 (a) Each passenger car, other than a convertible, manufactured before December 11, 1989 may be equipped with, and each passenger car, other than a convertible, manufactured on or after December 11, 1989 and before September 1, 1990 shall be equipped with a Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed pursuant to this provision shall

comply with Standard No. 209 (49 CFR 571.209) and with S7.1.1 of this standard.

(b) Except as provided in S4.1.4.2.1 and S4.1.4.2.2, each passenger car, other than a convertible, manufactured on or after September 1, 1990 and each convertible passenger car manufactured on or after September 1, 1991 shall be equipped with an integral Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed in compliance with this requirement shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1 and S7.2 of this standard. If a Type 2 seat belt assembly installed in compliance with this requirement incorporates any webbing tension-relieving device, the vehicle owner's manual shall include the information specified in S7.4.2(b) of this standard for the tension relieving device, and the vehicle shall comply with S7.4.2(c) of this standard.

(c) As used in this section, "rear outboard designated seating position" means any "outboard designated seating position" (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway that is located between the seat and the near side of the vehicle and is designed to allow access to more rearward seating positions.

S4.1.4.2.1 Any rear outboard designated seating position with a seat that can be adjusted to be forward-facing and to face some other direction shall either:

(i) Meet the requirements of S4.1.4.2 with the seat in any position in which it can be occupied while the vehicle is in motion; or

(ii) When the seat is in its forward-facing position, have a Type 2 seat belt assembly with an upper torso restraint that conforms to S7.1 and S7.2 of this standard and that adjusts by means of an emergency locking retractor that conforms with Standard No. 209 (49 CFR § 571.209), which upper torso restraint may be detachable at the buckle, and, when the seat is in any position in which it can be occupied while the vehicle is in motion, have a Type 1 seat belt or the pelvic portion of a Type 2 seat belt assembly that conforms to S7.1 and S7.2 of this standard.

S4.1.4.2.2 Any rear outboard designated seating position on a readily removable seat (that is, a seat designed to be easily removed and replaced by means installed by the manufacturer for that purpose) in a vehicle manufactured on or after September 1, 1992 shall meet the requirements of S4.1.4.2 and may use an upper torso belt that detaches at either its upper or lower anchorage points, but not both anchorage points, to meet those requirements. The means for detaching the upper torso belt may use a pushbutton action.

49 C.F.R. § 571.212 (1996)

S3. *Application.* This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less.

S4. *Requirements.* Except for open body type vehicles with a folding or removable windshield and forward control vehicles, the windshield mounting of each vehicle

shall retain not less than 50 percent of that portion of the windshield periphery on each side of the vehicle longitudinal centerline when tested in accordance with the procedures of §5. The requirement shall be met at any ambient temperature from 15ºF. to 110ºF.

S5. ***Test procedure.***

S5.1 Load the vehicle as specified by the applicable provisions of section S8.1 of Motor Vehicle Safety Standard No. 208, including a 50th percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested by a dummy under the provisions of Standard No. 208. Each dummy shall be restrained only by means that are installed in the vehicle for protection at its seating position and that require no action by the vehicle occupant.

S5.2 With the vehicle traveling longitudinally forward at any speed up to and including 30 mph, impact a fixed collision barrier that is perpendicular to the line of travel of the vehicle.